IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KETSON B. TOMMY, Appellant.	No. 37671-7-II UNPUBLISHED OPINION

Penoyar, J. — Ketson B. Tommy appeals his juvenile adjudication of second degree assault. He claims insufficiency of the evidence and the denial of effective assistance of counsel. Finding sufficient evidence and effective assistance of counsel, we affirm the adjudication but remand for an additional finding of fact.

Facts

On February 7, 2008, Brandyn[1] Austin entered the weight room at Evergreen High School and saw his friend, Jeremy Parker, "trash-talking" with another student, Ketson Tommy. Report of Proceedings (RP) at 8. He saw Tommy approach Parker, saying he was going to beat him up. Austin saw Tommy's anger rise as Tommy moved toward Parker. When they were at about arm's length, Austin stepped between the two because Parker had his arm in a sling and could not defend himself.

Tommy then started making the same threats to Austin. The two agreed to fight and

[1] The charging document and the court's findings use Brandyn while the record of proceedings uses Brandon. We use the former.

Austin followed Tommy down the stairs, outside, and around the corner of the school building. Once outside, Tommy picked up and threw five softball sized chunks of concrete at Austin. Austin was able to avoid being hit by stepping out of the way and said he was not afraid at the time because he had time to react due to the distance between them. Meanwhile, Tommy repeated that he was going to kill Austin, remarked that just because he, Tommy, was small did not mean he could not kill, and asked Austin if he wanted to die.

Tommy then picked up a large baseball bat size pipe and walked toward Austin, saying he was going to kill him. This scared Austin because he believed that if Tommy hit him with the pipe, it could cause serious harm. Austin reacted by turning around and walking back toward the school doors, but Tommy followed him and told him that if he did not turn around, he was going to strike him with the pipe. Austin was able to return safely into the school.

During this encounter, Charolyn Harton, a day custodian at the high school, saw the boys from a short distance away, but she was not close enough to hear their words. She identified Tommy as the boy with the pipe and described him as very agitated and angry and said that Austin "just [walked]" into the school. RP at 41. Harton called security.

The State charged Tommy with one count of second degree assault.[2] Following a bench trial, the juvenile court found him guilty, and made the following findings of fact:

> I. Findings of Fact
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> 1 On February 7, 2008, during weightlifting class at Evergreen High School, in Clark County, Washington, Brandyn Austin heard Ketson Tommy challenge one of Austin's friends to a fight.
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> 2. Because his friend had his arm in a sling, Mr. Austin moved between the two boys and asked Mr. Tommy to, "Back off."
>
> 3. Ketson Tommy then began to challenge Austin. Words were

[2] A violation of RCW 9A.36.021(1)(c).

exchanged between the two boys, and the two agreed to go outside to fight.

4. Once outside, Tommy repeatedly threatened Austin, telling him that he was going to "kick his ass". Austin remained silent. Tommy then began to pick up softball-sized pieces of rock and concrete, and threw them toward Austin. While Mr. Tommy threw these items, Tommy continued to threaten Austin.

5. When Austin moved to get away from the rocks and concrete that were being thrown, Tommy picked up a metal pipe, approached Austin, and threatened him with it.

6. Austin, fearful, urged Tommy to calm down, but Tommy continued threatening Austin with the pipe, and continued to tell Austin that he was going to kill him.

7. Austin walked away from Tommy. Tommy followed after Austin continuing to threaten him with the pipe he was still holding.

8. Carolyn Harton, an employee of Evergreen High School, saw a portion of the conflict between Tommy and Austin, and saw Tommy, who appeared to her to be very agitated, holding the metal pipe in his hand. She also observed him tapping the pipe in his hands and following after Austin.

9. Mr. Austin was in fact afraid that he would be hit with the pipe Mr. Tommy held in his hand.

10. Self-defense was not found with regards to Ketson Tommy, beyond a reasonable doubt.

11. The metal pipe Mr. Tommy used to threaten Mr. Austin is a deadly weapon, and was capable of causing serious injury and/or death.

12. The threatened use of the metal pipe by Ketson Tommy was not a reasonable response of force, and Mr. Austin's fear was reasonable under the circumstances.

13. All of the foregoing events occurred in Clark County, Washington.

II. Conclusions of Law:

1. The court has jurisdiction over the parties hereto and the subject matter of the action.

2. All of the above facts have been proven by the State beyond a reasonable doubt.

3. On February 7, 2008, in Clark County, Washington, Ketson Tommy, did intentionally assault Brandyn Michael Austin with a deadly weapon, to-wit a metal pipe, and is guilty of the crime of Assault in the Second Degree, as charged in Count 1. When Austin retreated in fear, Ketson Tommy was the aggressor. When Mr. Austin retreated, Mr. Tommy continued to follow and threatened Mr. Austin with the metal pipe. The use of the metal pipe was excessive, and the respondent did not act in self-defense.

Clerk's Papers (CP) at 9-11.

Anaylsis

I. Sufficiency of the Evidence

Tommy first argues that the trial court failed to make a finding of fact on an essential element of second degree assault; namely, that Tommy intended to create reasonable fear and apprehension of injury. Second degree assault, as charged here, where there is no actual or attempted battery, requires a specific intent to create reasonable fear and apprehension of bodily injury in the victim. *State v. Austin*, 59 Wn. App. 186, 194-95 n.4, 796 P.2d 746 (1990). He claims that neither the written or oral findings establish this element of proof.[3]

On review of the sufficiency of the evidence in a juvenile or adult proceeding, we ask whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the elements of the crimes beyond a reasonable doubt. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002); *State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486 (2000). We defer to the trier of fact on issues of credibility, conflicting evidence, and the persuasiveness of the evidence. *E.J.Y.*, 113 Wn. App. at 952. We treat any of the unchallenged juvenile court's findings of fact as verities. *State v. Gentry*, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995). We review any disputed findings to determine whether substantial evidence supports them. *State v. Ware*, 111 Wn. App. 738, 742, 46 P.3d 280 (2002). Here, the findings are undisputed and thus verities on appeal.

[3] "[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." *State v. Byrd,* 125 Wn.2d 707, 713, 887 P.2d 396 (1995) (citing Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law at 611 (1972)).

Tommy argues that the evidence shows no more than unlawful display of a weapon. He explains that he stood within striking distance for about two minutes but did nothing with the pipe and then Austin simply turned around and went back into the school. He argues that because he did not even try to strike Austin, nothing he did could have instilled fear and apprehension of bodily injury.

Our review of the evidence, taking it in the light most favorable to the State, supports a different picture. It shows Tommy as highly agitated and aggressive, willing to fight either young man, making threats to kill, throwing softball sized rocks, and coming at Austin, while wielding a metal pipe and asking him if he was ready to die. When Austin turned to walk away and return to the school, Tommy grew more enraged, chasing after him and demanding that he turn around or he would strike him with the pipe. It seems clear that his actions were intended to instill fear and apprehension of bodily injury in Austin.

While the findings of fact we set out above do not contain an explicit finding on Tommy's intent, the trial court's oral ruling addressed this element of the crime:

> The point at which an Assault in the Second Degree does occur is when the one gentleman decides that he is going to retreat because he has the pipe, he says he's scared, which meets the elements of the crime, and as he's retreating, the defendant then proceeds to become the aggressor and he advances on the alleged victim or the victim in this case even though the victim is retreating and still engages in conduct *which causes the apprehension and fear*, the trash -- the additional trash-talk, "I'm gonna kill you," those kinds of things that were said, and he still advances while the retreat is occurring.

RP at 69-70 (emphasis added).

When there is sufficient evidence to support a conviction but the juvenile court fails to make a finding on a proven essential element of the offense, the proper remedy is to remand for

such a finding. *State v. Alvarez*, 128 Wn.2d 1, 16-17, 904 P.2d 754 (1995). In *State v. Hescock*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999), this court noted that "a reviewing court may look to the trial court's oral ruling to interpret written findings and conclusions." (Citing *State v. Bynum,* 76 Wn. App. 262, 266, 884 P.2d 10 (1994), and *State v. Moon,* 48 Wn. App. 647, 653, 739 P.2d 1157 (1987)). Even though the trial court's oral decision appears to find that Tommy's conduct caused apprehension and fear in Austin, the State's prepared findings of fact and those the court entered did not make an explicit finding that Tommy had a specific intent to do so and remand is necessary to correct this deficiency. *Alvarez*, 128 Wn.2d at 16-17.

II. Effective Assistance of Counsel

Tommy next claims that he was denied his right to effective assistance of counsel by trial counsel's all-or-nothing approach to the charges when she should have argued that the lesser-included offense of unlawful display of a weapon was more appropriate to the facts. RCW 9.41.270(1) defines this offense:

> (1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

See State v. Ward, 125 Wn. App. 243, 248, 104 P.3d 670 (2004) (unlawful display of weapon is lesser included offense of second degree assault).

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*,

that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

"A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is a necessary element of the offense charged, and (2) the evidence in the case supports an inference that the lesser crime was committed." *State v. Speece*, 115 Wn.2d 360, 362, 798 P.2d 294 (1990) (citing *State v. Fowler*, 114 Wn.2d 59, 66-67, 785 P.2d 808 (1990); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978)). As to the second prong, "some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given." *Fowler*, 114 Wn.2d at 67.

The State concedes that unlawful display of a weapon can be a lesser-included offense but argues here that the facts did not support giving such an instruction. The uncontroverted evidence was that Tommy used verbal threats, threw rocks at Austin, and approached him while holding a metal pipe as if it were a baseball bat. Finally, after Austin retreated, Tommy chased after him with the pipe, threatening to strike him if he did not turn around. This evidence simply does not support giving the lesser included instruction. Counsel's decision not to offer such an instruction to the court was tactical, reasonable, and consistent with the facts.[4]

[4] Contrary to Tommy's present claim of an all-or-nothing defense, counsel argued in closing that at the most, the State should have charged Tommy with felony harassment, rather than assault. Thus, counsel did urge the court to find her client guilty of a less serious offense. *See* RCW 9A.46.020.

We affirm the adjudication but remand for an additional finding of fact on Tommy's specific intent.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Bridgewater, J.